Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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CASE NO. 88-534

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JIM SHOULDERS; HAROLD HAMMONS;
BEVERLY JACKSON; TROY BEAN;
JEROME CASSELL; STEVE COURTNEY;
WAYNE TRAVIS; AND BUD WALTMON

APPELLANTS

VS.

MCCRACKEN COUNTY, KENTUCKY;
JOHN HARRIS; FRED AUSTIN;
WAYNE LINDSEY; AND
DANNY ORAZINE

APPELLEES

ON APPEAL FROM THE SUPREME COURT OF KENTUCKY

BRIEF OPPOSING MOTION TO DISMISS

Counsel of record for appellants:

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TABLE OF AUTHORITIES

Brown-Forman Co. v. Kentucky, 217 U.S. 563, 54 L.Ed. 883, 30 S.Ct. 578 (1910) 3
Kenney v. Comptroller, 222 U.S. 525, 56 L.Ed. 299, 32 S.Ct. 105 (1912) 3
Ohio Oil Co. v. Conway, 281 U.S. 146, 74 L.Ed. 775, 50 S.Ct. 310 (1930) 2

BRIEF OPPOSING MOTION TO DISMISS

The appellees herein have filed a motion to dismiss which purports to be based on Rule 16.1 (b) and (d) of this Court. Specifically, the appellees allege that the appeal in this action fails to present a substantial federal question. Appellants submit that the appellees' motion itself refutes such a proposition.

First it should be noted that the appellees' approach to the issue is one in which they cite several cases they believe to support the legislation the appellants have challanged as unconstitutional. One can see immediately that an approach of this kind is more nearly suited for a motion to affirm under Rule 16.1(c). If the cases the appellees cite really do hold that their actions are in accord with Fourteenth Amendment Equal Protection, a motion to affirm would place this Court in a position to note that fact and to thereby ratify, or affirm, the decision of the Kentucky Supreme Court.

By citing so many prior decisions of this Court which deal with the issue of local and state taxation, the appellees have demonstrated that such issue, rather than *not* being a substantial federal question, is in fact *so substantial* that this Court has deemed it necessary time and again to speak to the issue. The content of this motion contradicts its premise. Therefore their motion to dismiss clearly must be denied. Moreover, they chose not to file a motion to affirm; thus they cannot be granted relief in that manner.

It should also be noted that what the appellees have done in their motion to dismiss is to argue the merits of their case. They fail to mention even a single reason why they believe no substantial federal question is presented. Again, their citations of authority indicate exactly the opposite. They do, from the opposing point of view, what the appellants were not permitted to do in their jurisdictional statement, and that is

to show why the appellees, and the Kentucky courts, are in error about the tax credit issue. The appellants, of couse, are prepared to respond in kind, but in compliance with the Rules of this Court are reserving their citations and arguments for the brief on the merits and oral argument. Unlike the appellees, appellants are aware that the brief and the oral argument are the proper places to state their case, and that the documents now before the Court are intended to demonstrate why this case should reach that stage.

Even thought the appellees have not adhered to proper procedure, the appellants feel that they have no choice but to respond to the thrust of the appellees' argument, *viz.*, that the Commonwealth of Kentucky and the County of McCracken were merely exercising discretion in formulating the challenged tax credit device, and that such discretion should not be disturbed by this Court. Appellees seem to believe that legislative discretion is virtually unbridled simple because the law-making authorities are closer to the problem than is this Court. The fallacy of this belief is pointed out in *Ohio Oil Co. v. Conway*, 281 U.S. 146, 74 L.Ed. 775, 50 S.Ct. 310 (1930), wherein this Court stated,

> "With all this freedom of action [enjoyed by the states with respect to the exercise of their taxing power], there is a point beyond which the State cannot go without violating the equal protection clause."

Next the appellees implicitly admit that the tax credit scheme would be unconstitutional if arbitrary or if hostile or oppressive to the appellants, and then proceed to state why they believe it is not arbitrary, hostile or oppressive. Again, this agrument goes to the merits of the case and the appellants' side has not yet been presented in this Court. A substantial federal question is presented on that point, however, as shown

by *Kenney v. Comptroller,* 222 U.S. 525, 56 L.Ed. 299, 32 S.Ct. 105 (1912):

> "The 14th Amendment . . . requires that in [the state's] exercise [of its taxing power] the citizen . . . shall not, by arbitrary and discriminatory provisions, be denied equal protection."

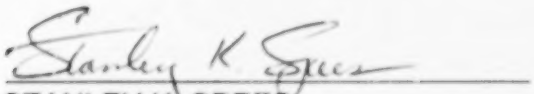
Finally the appellees extract from a case a sentence which recognizes that not all taxing statutes can be perfect in every respect, and insinuate that the sentence, and thus this Court, condone "imperfect" classifications. Obviously, that idea is absurd when put forth to suggest a law-making body can intentionally discriminate in an arbitrary manner against one or more individuals as in the case at bar. While some tax statutes may have relatively minor defects which cannot be easily cured, the glaring defect in the appellees' tax credit scheme can be rectified by a simple change even as the overall integrity of the tax ordinance is maintained. To make that change would protect the constitutional rights of every McCracken County taxpayer, and thereby bring the ordinance within the restriction enunciated in *Brown-Forman Co. v. Kentucky,* 217 U.S. 563, 54 L.Ed. 883, 30 S.Ct. 578 (1910):

> "Fundamental to the very existence of the governmental power of the states as is this function of taxation, it is nevertheless subject to the restriction that it shall not be so exercised as to deny *to any* the equal protection of the law." [Emphasis added.]

In summary, then, the appellees' motion to dismiss should be overruled because (a) it does not set forth a single reason supporting its premise that the case does not present a substantial federal question; (b) this Court's treatment of tax

issues in the past, as cited by the appellees, reinforces the notion that a substantial federal question is presented by this case; (c) the motion is structured as a motion to affirm, but does not seek that relief and thus must be denied; and (d) the validity of the classification made by the state and local governments is an issue which needs to be briefed and argued before the Court in order for the respective arguments to be fully addressed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

Pursuant to Rule 16.5, 28.3 Rule and Rule 28.5(b) of the United States Supreme Court Rules, 1, Stanley K. Spees, a member of the Bar of the United States Supreme Court, hereby certify that the foregoing Brief Opposing Motion to Dismiss has been served upon all parties required to be served in the following manner:

(a) Upon the appellees, McCracken County, Kentucky; John Harris; Fred Austin; Wayne Lindsey; and Danny Orazine, by depositing three (3) copies in a United States mailbox, with first-class postage prepaid, addressed to their counsel of record, Fred H. Grimes, Esquire, McCracken County Courthouse, Paducah, Kentucky 42001, Attorney for Appellees; and

(b) Upon the Commonwealth of Kentucky by depositing three (3) copies in a United States mailbox, with first-class postage prepaid, addressed to the Attorney General of Kentucky, Hon. Fredric J. Cowan, Jr., 120 State Capitol, Frankfort, Kentucky 40601;

all on this the 3RD day of November, 1988.

Stanley K. Spees

STANLEY K. SPEES